No. 3088.

IN THE

# United States Circuit Court of Appeals

## FOR THE NINTH CIRCUIT.

CHEW HOY QUONG, as Petitioner for and on behalf of his wife, Quok Shee,
*Appellant,*

vs.

EDWARD WHITE, Commissioner of Immigration at the Port of San Francisco, California,
*Appellee.*

## APPELLANT'S CLOSING BRIEF.

DION R. HOLM,
ROY A. BRONSON,
*Attorneys for Appellant.*

*Filed this.....day of March, A. D. 1918.*

FRANK D. MONCKTON, Clerk.

By....., Deputy Clerk.

THE RECORDER COMPANY, 689 STEVENSON ST., S. F.

No. 3088.

IN THE

# United States Circuit Court of Appeals

## FOR THE NINTH CIRCUIT.

CHEW HOY QUONG, as Petitioner for and on behalf of his wife, Quok Shee,
*Appellant,*

vs.

EDWARD WHITE, Commissioner of Immigration at the Port of San Francisco, California,
*Appellee.*

## APPELLANT'S CLOSING BRIEF.

The above cause has heretofore been argued and submitted, appellant herein, by leave of court first had and obtained, submits the following in reply to the brief of appellee herein.

I.

**The doctrine of the Mah Shee Case applies.**

Appellee attempts to differentiate the case at bar from the case of *Mah Shee* vs. *White,* 242 Fed. 868. It is urged by him that counsel *as such* did not request an interview with the applicant, but that they confined their request to an interview with the husband alone.

But counsel's request for an interview expressly stated that it was for the purpose of introducing further evidence in support of her appeal (Trans., p. 8), and manifestly such a broad request contemplated the attendance of her counsel. Certainly it was so understood by the commissioner, for in denying the request he expressly set forth that *"you as counsel* and the alleged husband" could not be permitted to interview the applicant. (Trans., p. 9.)

Under the doctrine of the *Mah Shee* case, *supra,* it is the *refusal* which constitutes the error, for in that case it was said:

> "We will add that if the *refusal* of the immigration officials had been limited only to that part of the request which contemplated the presence of Chung Leong at the interview asked for, we do not see that injustice would have been done."

In brief, therefore, the plain intent of the request made contemplated the attendance of the attorneys and the refusal expressly denied them that right.

## II.

**That confidential information was adduced and withheld from applicant's counsel.**

The amended petition which sets forth the memoranda, together with the admission of the return in regard thereto shows cause for the issuance of the writ forthwith.

It appears conclusively from that memoranda, first, that information was received relative to this case by the Commissioner at Angel Island, forwarded to the

Secretary of Labor, which the Department deemed confidential and authentic; secondly, it appears that the entire memoranda of that confidential information was on file with the Quok Shee record. (Trans., p. 12.)

That the Commissioner at Angel Island and the Secretary of Labor actually took into consideration the confidential matter appears from the context of the memoranda at page 12 of the transcript. It is there stated to see the case at bar for the confidential matter.

Now, whether the Department actually used that information or not becomes unimportant in the light of the fact that the information was withheld from the applicant's attorneys, both at the time they requested a rehearing before the Commissioner and at the time they were allowed to inspect what purported to be a complete record of the proceedings for the purpose of preparing their case on appeal.

This fact is not denied in the return to the petition and amended petition and shows cause for the issuance of the writ forthwith. It is not within the province or power of the Commissioner to adduce testimony and then to withhold it merely bceause he deems it confidential. It is within the express inhibition of Rule 5, Sub. (b) of the rules of the department governing these cases and the withholding of same deprived applicant of a fair hearing and constituted a gross abuse of discretion.

The memoranda which is admitted speaks for itself and the withholding of the information not being

denied, we submit the cause should be reversed and remanded with directions to let the writ issue forthwith.

## III.

### Disposition in event of reversal.

Respondent has suggested that in the event the lower court is reversed this Court should order the lower court, if it consider an order of discharge proper in the future proceeding before it, to make that order conditional upon the immigration officials giving the applicant a fair hearing within a period of days.

We do not understand this to be a proper nor an approved procedure.

When the Court finds that a full and fair hearing has been denied the detained in cases of this character, the inquiry naturally presents itself: is the detained entitled to her enlargement? This of course cannot be determined without knowledge of facts and to determine those facts a hearing must be had and since the Court under the *habeas corpus* proceedings has acquired jurisdiction over both the party and the subject matter it may proceed to determine whether or not the detained comes within the terms of the excluding statute before making the discharge absolute.

To make a conditional discharge as suggested, is to remand to the immigration officials. But such a procedure virtually makes the District Court a reviewing tribunal of the Department's decisions.

If an order is made referring this matter to the Commissioner of Immigration again, a fair and impar-

tial hearing is impossible as the confidential matter is on file and the laical minds of the Commissioner and the Examining Inspectors have, in a sense, been poisoned by this confidential matter. There is nothing to assure this Court or the applicant that a fair and impartial hearing will be granted as the confidential matter is on file at the Immigration Station. This Court nor the applicant have no assurance that the Examining Inspectors and Commissioner of Immigration will not again consider this confidential information keeping every trace of it out of the record.

The following authorities adopt and approve the method of procedure which we understand to prevail.

In *Chin Yow,* vs. *United States,* 208 U. S. 8, 52 L. Ed. 369, Mr. Justice Holmes says:

> "The petitioner then is imprisoned for deportation without the process of law to which he is given a right. *Habeas corpus* is the usual remedy for unlawful imprisonment. But, on the other hand, as yet the petitioner has not established his right to enter the country. He is imprisoned only to prevent his entry and an unconditional release would make the entry complete without the requisite proof. The courts must deal with the matter somehow, and there seems to be no way so convenient as a trial of the merits before the judge. If the petitioner prove his citizenship, a longer restraint would be illegal. If he fails, the order of deportation would remain in force."

In *Whitfield* vs. *Hanges,* 222 Fed. 745, the Circuit Court of Appeals passed directly upon the point raised by respondent herein. Said the Court (page 756):

"The order of the court below was that the appellees be discharged without prejudice to the right of the Bureau of Immigration to proceed against them in a lawful manner to prove, if it could do so, the grounds alleged in the warrant of arrest. The practice approved by the Supreme Court and generally prevailing, however, seems to be that the court which takes jurisdiction and custody of the alien under the writ of *habeas corpus* and finds that his hearing has been unfair retains custody and jurisdiction of him and of the case, and tries the merits *de novo* on evidence introduced before that court the question whether or not the alien is guilty of the charges made against him in the warrant of arrest before making his discharge absolute. Meanwhile the court has ample power to admit the alien to bail or to take his own recognizance."

Again in the case of *United States* vs. *Williams,* 193 Fed. 228, Judge Hand decides the question in conformity with the reasoning of the foregoing cases. After determining that a full and fair hearing had been denied the alien immigrant and that consequently the writ should issue, says:

"The question must then be determined: What further disposition shall be made? Under *Chin Yow* vs. *United States,* 208 U. S. 8; 52 L. Ed. 369, it seems to me that, once I have taken jurisdiction I must dispose of the question as to the alien's freedom. It is true that the issue there was citizenship; but the character of the issue is irrelevant, so long as upon it depends the right of the relator to enter the country, the unlawful deprival of which right is, under *Chin Yow* vs. *United States, supra,* an unlawful imprisonment. Mr. Weissager suggests that I may send him back to the immigration authorities with direction for hearing before the board of special in-

quiry; but this presupposes a right of review of their proceedings, which I do not understand I have. I think but one question is to be determined by me, and that is, whether he is wrongfully detained. The preliminary question in determining that, is whether he has been denied the right which the statute vouchsafes him. Then, if I decide he has been denied these, I must determine whether he is entitled to his enlargement, and that brings up the question whether he is excluded within the terms of the statute or not. I cannot determine that without further facts, and in order to obtain those facts there must be a hearing."

In *United States* vs. *Ruiz,* 203 Fed. 441, 121 C. C. A. 551, the Court says:

"If a fair though summary hearing has been denied the immigrant, the District Court has jurisdiction to hear the matter, upon the merits, upon *habeas corpus,* and release the immigrant, if it be shown on the hearing before it, even by evidence not offered on the hearing before the executive officers, that he does not belong to any one of the excluded classes. As a preliminary to entering upon a trial of the merits, the District Court must first determine that the immigrant was denied a fair hearing before the Commissioner of Immigration or before the Secretary upon appeal to him from the Commissioner. (*United States* vs. *Ju Toy,* 198 U. S. 253; *Chin Yow* vs. *U. S.,* 208 U. S. 8.)"

In *United States* vs. *Cau Pon,* (C. C. A.) 168 Fed. 479, at page 484, Judge Gilbert, in rendering the opinion of the Court, said:

"Having been denied the benefit of all the testimony taken upon the question of his right of

> admission to the United States, the applicant has been deprived of the right of appeal which the statute confers upon him, and he may, therefore, upon *habeas corpus,* test the legality of his imprisonment."

The jurisdiction and power of the District Court to hear *de novo* the merits is derived expressly from the terms of the Judicial Code. (R. S., sec. 761.)

> "The court, or justice, or judge shall proceed in a summary way to determine the facts of the case by hearing the testimony and arguments, *and thereupon to dispose of the party as law and justice require.*"

We respectfully submit, therefore, that the order of the District Court be reversed, with directions to let the writ issue, and for the District Court to try *de novo* the merits as to whether the applicant is entitled to admission.

DION R. HOLM,
ROY A. BRONSON,

Attorneys for Appellant.